Supreme Court, U.S.
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No. 02-1169

In The
Supreme Court of the United States

CITY OF LODI, CALIFORNIA,

Petitioner,

v.

FIREMAN'S FUND INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petition for Certiorari misstates the questions that would be presented if the Court were to grant certiorari. The case was dismissed by the district court on a Federal Rule of Civil Procedure 12(b)(6) motion filed by the defendant and petitioner, City of Lodi ("Lodi"). Thus, the allegations of the Complaint provide the factual basis for the issues on appeal. If the Court were to grant certiorari, the questions presented would be:

(1) Does the *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 U.S.C. §9601 *et seq.* ("CERCLA") preempt specific provisions of Lodi's "*Comprehensive Municipal Environmental Response and Liability Ordinance*" (MERLO), a municipal ordinance passed by a city alleged to be jointly and severally liable under CERCLA for response costs, that conflict with CERCLA provisions governing the allocation of liability for response costs among that city and other potentially responsible parties?

(2) Does CERCLA preempt specific MERLO provisions that conflict with CERCLA provisions governing the recovery of litigation costs by a city that is alleged to be jointly and severally liable under CERCLA for response costs?

CORPORATE DISCLOSURE STATEMENT

Respondent Fireman's Fund Insurance Company is a wholly-owned subsidiary of Allianz Insurance Company, which is a wholly-owned subsidiary of Allianz of America, Inc., which in turn is a wholly-owned subsidiary of Allianz A.G., a German corporation. With the exception of Allianz Insurance Company, no publicly held company owns ten percent or more of Fireman's Fund Insurance Company stock.

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STATEMENT OF THE CASE[1]

A. Factual Background

1. The Lodi Groundwater Site

As alleged in the Complaint below, beginning in April 1989, Lodi detected tetrachloroethane (also known as perchloroethene or "PCE") in its groundwater. Shortly thereafter, the Central Valley California Regional Water Quality Control Board (the "Board") began investigating groundwater contamination in Lodi. The Board issued a report of its findings in 1992. Its report revealed that Lodi bore significant responsibility for the contamination. Lodi's sewers, which leaked due to poor construction and maintenance, were a principal conduit for contamination.

In 1995, the California State Department of Toxic Substances Control ("DTSC") directed an expanded investigation to identify the extent of and additional sources of groundwater contamination in Lodi. DTSC is a state agency charged with enforcement of the California Hazardous Substance Account Act, California Health & Safety Code §25300 *et seq.* ("HSAA"), the state's analog to

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[1] Since this case was decided on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the "facts" are those contained in Fireman's Fund's Complaint. Therefore, the "facts" in Lodi's Petition for Writ of Certiorari, many of which differ from those contained in Fireman's Fund's Complaint, were not considered by the lower courts, are not part of the record in this case, and can provide no basis for certiorari review. *Compare* Pet. 13-15 *with* Complaint, Excerpt from Record on Appeal at 001-027. Many of these "facts," such as the absence of the Lodi cite on the federal NPL, are irrelevant. Others, such as the claim that the Cooperative Agreement bars "the state" from asserting CERCLA claims, are contested.

CERCLA. The DTSC investigation confirmed that the Lodi sewers were a major source of groundwater contamination.

2. Lodi Retains Special Counsel

Facing significant liability for its groundwater contamination, by January 1997, Lodi had retained a private law firm for a fee of $65,000.00 per month to advise it. The law firm was hired "to go after insurance money." *See* Complaint at 5, Excerpt from Record on Appeal at 006. It was expected that the firm's monthly fee "would be repaid as the law firm secures settlements from insurance companies providing coverage for businesses responsible for the pollution." *Id.* In effect, as the Ninth Circuit noted, "Lodi has expended significant attorney's fees in an attempt to escape liability through the enactment and defense of its municipal ordinance. These efforts, so far as we can tell, have not advanced the cleanup of the Lodi Site." *See Fireman's Fund Ins. Co. v. City of Lodi, et al.*, 302 F. 3d 928, 953 (9th Cir. 2002).

3. Lodi Settles With DTSC

DTSC negotiated with Lodi and three other potentially responsible parties to try to effect a cleanup of the Lodi groundwater site. In May 1997, Lodi settled with DTSC by agreeing to pay DTSC just over $1 million. Lodi also undertook either to compel other responsible parties to cleanup the site or to cleanup the entire site itself. The settlement was reported to be "part of a high-stakes strategy in which the city is going after insurance companies to pay for the pollution cleanup." *See* Complaint at 7-8, Excerpt from Record on Appeal at 008-009.

4. Lodi Enacts An Environmental Law

On August 6, 1997, the Lodi City Council adopted the "Comprehensive Municipal Environmental Response and Liability Ordinance," No. 1650 ("MERLO").[2] Lodi modeled MERLO on CERCLA and California's HSAA, but modified their terms in crucial ways to expand Lodi's authority and reduce its liability. MERLO was designed to shift all the costs of cleanup for which Lodi is responsible under CERCLA to other parties. In doing so it conflicts with CERCLA. For example, MERLO:

1. allows Lodi, and only Lodi, even though it is itself liable for response costs under CERCLA, to impose joint and several liability for *all* response costs, including its own, on other responsible parties, contrary to CERCLA;

2. forbids apportionment of liability (for example, back to Lodi) unless the responsible party meets a higher burden of proof than the burden of proof provided by CERCLA for the same purpose;

3. makes no provision whatever for contribution claims against the City, unlike CERCLA §113(f), 42 U.S.C. §9613(f);

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[2] On November 17, 1999, Lodi's City Council repealed Ordinance No. 1650 and enacted Ordinance No. 1684. The ordinances are substantially similar. As the Ninth Circuit held, "the controversy between the Insurers and Lodi is still 'live' and [] the repeal and reenactment of MERLO did not moot the Insurers' claims at issue in this appeal." *See Fireman's Fund*, 302 F. 3d at 936 n.8. The Ninth Circuit also stated that it "must decide the issues raised in these related appeals on the current version of MERLO," and, thus, applied the most recent version of MERLO because it was "the law in effect at the time of decision." *See id.*

4. permits Lodi to order remediation more stringent than the NCP, contrary to CERCLA;

5. allows Lodi to recover any attorney's fees and "abatement action costs" it incurs in cleaning up contamination, contrary to CERCLA. (This provision is designed not only to recover the City's excessive attorney's fees, which were already $8 million in 1999 and are recently reported to have grown to $16.7 million, but also the usurious arrangement to finance these fees arranged by an investment bank at the City's expense).

In sum, MERLO conflicts with federal law because it is part of an elaborate scheme to shift Lodi's CERCLA liability onto others.

B. Procedural Background

1. District Court Proceedings

On August 6, 1998, Fireman's Fund filed a complaint (the "Complaint") against Lodi and several individual defendants in the United States District Court for the Eastern District of California (the "District Court"). The Complaint alleged six claims for relief, based on CERCLA's and HSAA's preemption of MERLO and violations of the United States and California Constitutions, based on a denial of procedural and substantive due process, equal protection and contract clause rights. The Complaint sought a declaration that MERLO is invalid and requested injunctive relief against its further enforcement.

On February 25, 1999, the District Court issued its opinion on Lodi's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss the Complaint. The District Court ruled that Fireman's Fund had not stated a claim for CERCLA preemption and, *sua sponte*, the district court

abstained from deciding Fireman's Fund's remaining constitutional claims. Thus, the District Court did not consider many claims in the Complaint, which included claims that MERLO: (1) violated Article II, Section 7 of the California State Constitution; (2) violated Fireman's Fund's procedural due process rights under the Fourteenth Amendment; (3) violated Fireman's Fund's substantive due process rights under the Fourteenth Amendment and Article I, Section 7 of the California State Constitution; (4) impaired Fireman's Fund's right to contract under Article I, Section 10, Clause I of the U.S. Constitution and Article I, Section 9 of the California State Constitution; and (5) denied Fireman's Fund equal protection under the Fourteenth Amendment and Article I, Section 7 of the California State Constitution.

2. The Ninth Circuit Court Of Appeals' Decision

Fireman's Fund filed its appeal of the District Court's ruling on June 11, 1999. On October 8, 2002, the Ninth Circuit Court of Appeals ("Ninth Circuit") issued its final decision on the appeal.[3] With regard to Fireman's Fund's preemption claims, the Ninth Circuit agreed with Lodi, that CERCLA and HSAA do not preempt the field of hazardous substance remediation, and that municipalities have some power to legislate in this area. *See Fireman's Fund*, 302 F. 3d at 943, 956. The Ninth Circuit held, however, that "CERCLA permits both states and their political subdivisions to enact hazardous waste regulations

[3] As a result of two petitions for rehearing, the Ninth Circuit issued two prior opinions in this matter. Its opinion of October 30, 2001 was withdrawn on April 17, 2002. A new opinion was issued on August 6, 2002, which was modified on October 8, 2002.

and pursue additional remedies, *as long as those remedies do not conflict or interfere with 'the accomplishment and execution of [CERCLA's] full purpose and objective. . . .'"* *See id.* at 943 (*quoting Indus. Truck Ass'n, Inc. v. Henry*, 125 F. 3d 1305, 1309 (9th Cir. 1997)) (emphasis added).

The Ninth Circuit held that three of MERLO's provisions are preempted by CERCLA or California state law, and that several others may be preempted if, upon remand, the District Court determines that Lodi is a potentially responsible party ("PRP") under CERCLA.

a. Preempted Provisions

Stating that Lodi "cannot foist its share of liability onto others by imposing on fellow PRPs a higher burden of proof for apportionment," the Ninth Circuit found that MERLO's provision imposing a higher burden of proof on entities that seek to apportion liability for cleanup costs "is preempted because it stands as 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *See id.* at 947 (*quoting California Fed. Sav. & Loan Ass'n, et al. v. Guerra, et al.*, 479 U.S. 272, 281 (1987)). "[F]or the same reasons that MERLO's burden of proof is preempted," the Ninth Circuit found MERLO's provision that allows Lodi to require remediation procedures that are more stringent than the NCP to be preempted by CERCLA. *See id.* at 951.

b. Conditionally Preempted Provisions

In addition, the Ninth Circuit determined that MERLO's provisions that allow "Lodi to impose joint and several liability on other PRPs and to recover attorneys'

fees may be preempted under the doctrine of conflict preemption if the district court finds that Lodi itself is a PRP. To the extent that MERLO protects Lodi from contribution claims by other PRPs, MERLO is also preempted if the district court finds that Lodi is a PRP." *See id.* at 956-57. Since it was plainly alleged that Lodi is a PRP, this qualified ruling favored Lodi.

With respect to MERLO's provision disallowing contribution claims, the Ninth Circuit found that "[i]f Lodi is indeed a PRP, it cannot simply legislate away this potential contribution liability under state and federal law." *See id.* at 946. Therefore, "MERLO is preempted to the extent that it legislatively insulates Lodi from contribution liability under state and federal law." *See id.* Similarly, MERLO's provision allowing Lodi to impose joint and several liability on other PRPs is preempted because if Lodi is a PRP, it "may not escape its share of responsibility by imposing all the costs of cleanup on others. Allowing it to do so would interfere with CERCLA's PRP cost allocation scheme. . . . " *See id.* at 947.

Regarding MERLO's provision that allows Lodi to recover the attorney's fees it incurs, the Ninth Circuit determined that this provision, too, is preempted if Lodi is a PRP:

> Litigation costs may indeed be a part of recovering funds that are needed to advance the cleanup. However, the ability to recover litigation-related attorney's fees does not necessarily advance the pace of cleanup because it may encourage ambitious litigation. We do not interpret the Cooperative Agreement to allow Lodi to recover its attorney's fees, nor do we necessarily believe that it could bestow on Lodi the right to

> recover all of its attorney's fees under the circumstances of this case.

Id. at 953-54.

Based on this ruling, the Ninth Circuit remanded the case for the District Court to determine whether Lodi is a PRP. *See id.* at 958. The District Court must also consider Fireman's Fund's five remaining constitutional claims.

On February 5, 2003, Lodi filed its Petition for Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

Lodi's Petition for Writ of Certiorari (the "Petition") is largely a merits brief, not a certiorari petition. It argues with passion that the Ninth Circuit's decision in *Fireman's Fund Ins. Co. v. City of Lodi, et al.*, 302 F. 3d 928 (9th Cir. 2002) (the "Ninth Circuit's decision") errs. The Petition, however, fails to explain why this Court should grant Certiorari to consider the alleged errors. The Court should not, for two obvious reasons.

First, this case is not ripe for Supreme Court review. The Ninth Circuit remanded the case for the District Court to determine whether Lodi is a PRP under CERCLA at the time that Lodi passed and sought to enforce the municipal environmental ordinance at issue in this case. In addition, five constitutional claims contained in Fireman's Fund's Complaint have not yet been considered by the District Court. The issues regarding CERCLA preemption addressed by the Ninth Circuit are better reviewed, if at all, after the District Court resolves these outstanding issues.

Second, the Petition fails to identify a significant federal question calling for review. Lodi asserts in a heading in its Petition that certiorari should be granted because the Ninth Circuit's decision decides important federal questions "in a way that conflicts with decisions of this Court, of other U.S. Courts of Appeal, and of the California Supreme Court." Petition ("Pet.") at 8. Yet, the text of the Petition fails to identify any such conflicts and simply reargues the merits of Lodi's case.

Accordingly, Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT RIPE FOR REVIEW

The Ninth Circuit's decision remanded the case for the District Court to determine whether Lodi is a PRP under CERCLA. *See Fireman's Fund*, 302 F. 3d at 958. Depending upon the District Court's determination regarding the PRP issue, three of the questions presented by Lodi's Petition could be mooted: whether MERLO is preempted by CERCLA and HSAA because it (1) protects Lodi from contribution claims from other PRPS; (2) allows Lodi to impose joint and several liability; and (3) allows prevailing parties to recover their attorney's fees and other costs. *See* Pet. at ii. As a result, review by this Court of the issues raised in the Petition would be more informed after the District Court has made a determination of Lodi's status as a PRP under CERCLA.

Where the court of appeals remands a case for further proceedings, "it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen, et al.*

v. Bangor & Aroostook Railroad Co., et al., 389 U.S. 327, 328 (1967) (denying petition for writ of certiorari where court of appeals ruled on various legal issues and remanded case to district court for further consideration). This Court has previously stated its reluctance to exercise certiorari jurisdiction until final judgment has been reached in the lower courts. *Virginia Military Institute, et al. v. United States*, 508 U.S. 946 (1993) (denying petition for writ of certiorari where the court of appeals vacated the judgment that had been entered in favor of petitioners and remanded case to the district court for determination of an appropriate remedy).

Lodi's Petition is premature and should be denied.

II. THIS CASE DOES NOT MEET THE CRITERIA FOR CERTIORARI UNDER SUPREME COURT RULE 10

In its Petition, Lodi says that it will address the conflict between the Ninth Circuit's decision and the decisions of other federal and state courts after a "brief[ ] review [of] the law of preemption as well as the three complimentary statutory schemes that deal with the clean-up of hazardous waste sites at the federal, state, and local level, and that are relevant to this petition. . . . " Pet. at 8. The Petition, however, never provides the promised details that explain how the Ninth Circuit's opinion conflicts with any other federal or state court decisions. Nor could it. No such conflicts exist.

A. The Petition Fails To Identify An "Important Federal Question Decided In A Way That Conflicts With Relevant Decisions Of This Court"

Lodi does suggest at one point that the Ninth Circuit's decision conflicts with this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) because it "misapplied *Mortier* and effectively federalized remedial environmental law by applying CERCLA to a non-CERCLA site." Pet. at 3. According to Lodi, the Ninth Circuit's decision "limited the application of CERCLA's savings clauses to the doctrine of 'field' preemption," thereby leaving "the Ninth Circuit free to essentially ignore CERCLA's savings clauses during its 'conflict' preemption analysis." Pet. at 4.

The suggestion of a conflict with *Mortier* is spurious. The Ninth Circuit's decision rejected the Fireman's Fund joint federal and state "field preemption" argument, agreeing with Lodi that a municipality can enact a local version of CERCLA, even one that largely duplicates the existing California state analog to CERCLA, the HSAA. The Ninth Circuit found that "*Mortier's* reasoning regarding FIFRA is equally applicable to CERCLA. Like FIFRA, CERCLA anticipates that states will enact supplemental remedial environmental legislation." *Fireman's Fund*, 302 F. 3d at 942. Accordingly, the Ninth Circuit held that "CERCLA and HSAA do not preempt the field of hazardous waste remediation, either explicitly or by implication." *Id.* at 956. While the Ninth Circuit found "that several sections of MERLO are preempted by state and federal law under the doctrine of conflict preemption . . . [w]e conclude that the balance of MERLO remains viable and is not preempted by either state or federal law." *Id.* at 957.

Lodi's perceived conflict between the Ninth Circuit decision and *Mortier* is based on a flawed understanding of preemption, an issue that the Ninth Circuit squarely addressed:

> Lodi's argument does not recognize the difference between field preemption and conflict preemption. We have indeed held that CERCLA's savings clauses make it clear that CERCLA does not preempt the *field* of hazardous waste cleanup. (citation omitted) As this opinion makes clear, municipalities such as Lodi may exercise significant powers of self-protection in regulating hazardous waste cleanup. However, the powers of municipalities are not unlimited. Where municipal legislation comes into conflict with CERCLA, we find the municipal legislation to be preempted, just as other circuits have found conflict preemption in other circumstances, notwithstanding the same savings clauses cited by Lodi.[4]

Id. at 952, n.26.

Contrary to Lodi's understanding, *Mortier* does not *absolutely* shield local ordinances from preemption. Thus, even if the field of hazardous substance cleanup is not preempted by CERCLA, specific provisions of a municipal ordinance, such as MERLO, may be preempted where they present "an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Id.*, *quoting*

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[4] Moreover, the cases cited by the Ninth Circuit in its decision support the fact that its decision, far from conflicting with those of other circuit courts, follows the same reasoning. *See Fireman's Fund*, 302 F. 3d at 952, n.26.

Bedford Affiliates v. Sills, 156 F. 3d 416, 426-27 (2nd Cir. 1998).

Lodi won rather than lost the issue as to which *Mortier* was deemed the controlling precedent by the Ninth Circuit – the issue of whether a municipality could pass a local version of CERCLA and its California state analog, the HSAA. There is no conflict between the Ninth Circuit's decision and *Mortier*.

B. The Petition Fails To Show That The Decision Below Is "In Conflict With The Decision Of Another United States Court Of Appeals On The Same Important Matter"

The Petition's only mention of any conflict between the Ninth Circuit's decision and the decisions of any circuit court is limited to the conclusory heading on page 8 (stating that "[t]he Ninth Circuit's published opinion decided nationally important questions of federal law in a way that conflicts with decisions of this Court, of other U.S. Courts of Appeal, and of the California Supreme Court."). The remainder of the Petition fails to specify any conflicting decision.

Indeed, as the Ninth Circuit points out, its ruling that several provisions of MERLO are preempted by CERCLA is consistent with similar rulings from other circuit courts. *See, e.g., Fireman's Fund*, 302 F. 3d at 952, n.26; *see also Bedford Affiliates*, 156 F. 3d at 426-27 (finding that CERCLA preempts state common law restitution and indemnification actions); *In re Reading Co.*, 115 F. 3d 1111, 1117 (3rd Cir. 1997) (concluding that CERCLA preempts state common law restitution and contribution claims); *PMC, Inc. v. Sherwin Williams Co.*, 151 F. 3d 610, 617-18, 620

(7th Cir. 1998) (finding that CERCLA preempts parts of the Illinois Contribution Act). A discussion of the holdings in these cases is conspicuously absent from Lodi's Petition.

The only conceivable inconsistency with another circuit court decision suggested in the Petition is Lodi's argument accompanying the citation to *United States, et al. v. Akzo Coatings of America, Inc., et al.*, 949 F. 2d 1409 (6th Cir. 1991). Lodi contends that "only when CERCLA's response or liability scheme is properly invoked that CERCLA becomes applicable and acts to set a floor, not a ceiling, for environmental protection." Pet. at 26-27 (citing *Akzo*). Thus, Lodi appears to claim that the Ninth Circuit's holding that MERLO is preempted "only to the extent that [MERLO] permit[s] Lodi to order use of procedures more stringent than the NCP" conflicts with *Akzo*. *See Fireman's Fund*, 302 F. 3d at 952.

A review of *Akzo* reveals no conflict.

The Sixth Circuit underscored that it was not engaging in typical conflict preemption analysis: "We *eschew use of the word preemption* in this context. . . . " *See Akzo*, 949 F. 2d at 1458 (emphasis added). As *Akzo* explained:

> [T]he language of CERCLA and the legislative history of that act indicate that once the consent decree is entered by a federal court – giving the decree the force of law – alternative state remedies may not be pursued. *See* 42 U.S.C. §9621(f). At that point, other remedies based on state law are *in effect preempted by* the federal and state law embodied in *the decree* through a mechanism incorporating the federal standards and *any*

> *relevant more stringent state standards*. Because it is the terms of the consent decree, and not the language of CERCLA, which preempt alternative state remedies, *the use of the word preemption creates some confusion in this case.*

Id. at 1454-55 (emphasis added). Thus, in *Akzo*, the Sixth Circuit was addressing the statutory procedures provided by CERCLA for accommodating federal and state law in the process of establishing appropriate cleanup standards for a particular site. *See* 42 U.S.C. §9621(f)(2). This CERCLA statutory procedure is not at issue in *Fireman's Fund.* In sum, there is no conflict between the Sixth Circuit's holding in *Akzo* and the Ninth Circuit's holding in *Fireman's Fund.*

C. The Ninth Circuit's Decision Does Not Conflict With Any Decision of the California Supreme Court

The Petition states, again in the heading on page 8, that the Ninth Circuit's decision conflicts with a decision of the California Supreme Court. Again it fails to identify any conflicting California Supreme Court decision. Indeed, the only references to decisions of the California Supreme Court in the Petition appear in a discussion at pages 19-21, the substance of which is that the Ninth Circuit misinterpreted MERLO and its interaction with state law in making its preemption ruling. We think not, but assuming *arguendo* that Lodi is correct, that presents only a question of the interaction of municipal and state law, not an important question of federal law. This Court does not normally review municipal law questions on certiorari. At base, the Petition identifies no conflict between the Ninth

Circuit's decision and decisions of the California Supreme Court that justifies granting Lodi's Petition.

CONCLUSION

There is no reason for this Court to review this case. It is not ripe for review and presents no conflict with decisions of this Court, any circuit court, or any decision of the California Supreme Court. The Petition should be denied.

DATED: March 7, 2003

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